

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANNY MARION BRAYBROOK,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 223088

Newaygo Circuit Court

LC No. 98-006797-FC

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of voluntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of three to fifteen years' imprisonment for the manslaughter conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

We first address defendant's appellate argument regarding the sufficiency of the evidence. Defendant admitted to fatally shooting his neighbor in a dispute over a business deal gone awry; however, defendant maintained that the shooting was committed in self-defense. On appeal, defendant argues that the trial court erred by denying his motion for a directed verdict. We disagree.

Because challenges to the sufficiency of the evidence implicate the constitutional right to due process, we review this issue de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[T]his Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The scope of review is the same whether the evidence is direct or circumstantial; circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Id.*

Defendant was convicted of voluntary manslaughter and possession of a firearm during the commission of a felony. “Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool.” *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). See also *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). “The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony.” *Davis, supra* at 53. Here, defendant does not challenge whether the elements of those crimes were proved beyond a reasonable doubt; rather, defendant contends that the prosecution failed to present evidence to disprove his claim of self-defense, rendering the homicide justifiable and the felony-firearm charge accordingly inapplicable.

“In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). Thus, a finding of self-defense is appropriate where the defendant acted intentionally, but his actions were justified by the circumstances. *Id.* at 503. “Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

In this case, defendant claimed that he shot the victim in self-defense. Defendant gave two consistent statements to the police about the incident, in which he described how the victim lunged at him following an argument in defendant’s garage about a land deal that had soured. In his statements to the police, defendant explained that he was afraid of the victim, who had a history of assaultive behavior and allegedly had threatened defendant and his wife if they did not go ahead with the land transaction, and how the victim would respond when defendant attempted to back out of the land deal. Thus, defendant purportedly began preparations to move away from the victim, who was his next-door neighbor and, in anticipation of meeting with the victim, defendant went to the police station on the day of the shooting to seek advice on how to deal with the situation. That same day, defendant bought a handgun and registered it with the sheriff’s department.

In his statements, defendant told the police that he anticipated the victim coming over on the night of the shooting and he told his wife to send the victim out into the garage, where defendant would be waiting. Defendant’s reason for this arrangement was to protect his wife from the victim, who had a reputation for harassing women. Defendant brought some documents to the garage to show the victim, to demonstrate that he was moving forward on the land deal in good faith; defendant hoped to avoid telling the victim that he was backing out of the deal until his arrangements to move were complete. The two men started to argue. Defendant purportedly told the victim to go home and even offered him \$10,000 to buy his way out of the deal, but the victim refused. Defendant claimed that he then noticed that the victim was holding a military survival knife, which defendant had earlier used to cut some insulation to install around the fuse box in his garage. According to defendant, the victim was holding the knife in his right hand and a beer can in his left hand. In his statements, defendant stated that he warned the victim that he had a gun and that the victim should leave; however, the victim lunged at defendant with the knife and defendant fired two shots, killing the victim.

Several witnesses testified that defendant was a peaceable man, but that the victim had a reputation for being violent, particularly when he was drinking and particularly toward women.

Although the victim's daughter testified that she had not seen him drinking and that he did not have a beer in his hand when he walked over to defendant's house, the victim had a blood alcohol level of 0.19% at the time he was shot by defendant. A forensic pathologist testified that the angles of the gunshot wounds to the victim were consistent with two shots fired in quick succession and the wounds were consistent with defendant's claim that he was about four feet away from the victim when he fired the shots.

On appeal, defendant claims that the above evidence demonstrates that he honestly and reasonably feared for his life when he was confronted by the victim and that he acted in self-defense. Defendant maintains that the prosecution failed to disprove this evidence of self-defense beyond a reasonable doubt.

However, a thorough review of the record leads us to a contrary conclusion. Detective Miller, who investigated the incident, testified on behalf of the prosecution that he believed the knife found near the victim's body had been planted by defendant to make the shooting appear as if it were committed in self-defense. His theory was based on three observations. First, defendant claimed that he had used the knife earlier that day to cut some insulation, but defendant's garage had been finished for some time, except for the area around the fuse box, making it suspicious that defendant had chosen that day instead of anytime in the past few years to insulate around the fuse box. Second, there were no visible cut marks on the cardboard on which the insulation was resting, thereby undermining defendant's claim that he had used the knife to cut the insulation. Third, the tape measure was locked in the open position, which was suspicious because most people, when finished measuring, would allow the tape measure to return to the retracted position. From these observations, the detective concluded that the scene had been staged.

Also, the detective testified that after the tape recorder was turned off during defendant's interview, defendant said, "I shouldn't tell you this, but now that you've got this turned off, I'll tell you. He never saw the gun." Detective Miller opined that this contradicted defendant's earlier statements that he told the victim he had a gun and raised it to a level where the victim should have seen it. Thus, Detective Miller concluded that, although defendant may have been legitimately afraid of the victim, he overreacted to the situation and planted the knife as an afterthought to explain the shooting.

Detective Miller testified that his skepticism about defendant's account was further fueled by defendant's claim that the victim held the knife in his right hand, when the victim was in fact left-handed. The victim's daughter and one of his ex-wives testified that he had only limited use of his right hand, although he was admittedly not so disabled as to prevent him from holding a knife. The detective concluded that it was unlikely that the victim would have attempted to use the knife in his non-dominant, partially disabled hand.

The prosecution also presented evidence that sometime after the incident, defendant called his friend, one of the investigating police officers, to ask him whether he should seek counseling about the shooting. Although the officer refused to discuss the progress of the investigation, defendant asked him whether he thought that defendant "was smart enough to get away with what had happened." Certainly this statement could be interpreted as being inculpatory in nature.

The prosecution produced other evidence disproving defendant's claim of self-defense. The victim's daughter testified that prior to going over to defendant's home on the night in question, the victim was in a good mood. She also stated that he was not carrying a can of beer with him at that time. This testimony contradicted defendant's statements to the police wherein he said that the victim held a beer in his left hand and came at him with the knife in his right hand. One of the victim's former wives testified that while defendant was vicious toward her, he had never used a weapon. Finally, the testimony indicates that while defendant was purportedly so fearful of the victim that he went to the police station on the day of the shooting to seek guidance on how to deal with the situation, he ignored the warnings of a police officer to stay away from the victim. Immediately after being told to stay away from the victim, defendant purchased a pistol and had it with him that evening after he arranged for and expected the victim to arrive at his residence to discuss the pending land deal, a deal which defendant was attempting to cancel.

The sum and substance of the evidence indicates that while the defense maintained that the shooting was self-defense, the prosecution presented sufficient evidence to refute that theory, thus leaving it up to a jury to make a final determination. The manner in which the arrangements for the meeting between defendant and the victim had been made, the fact that defendant brought a pistol to the meeting, the way the insulation had been laid out on cardboard, the lack of cut marks in the cardboard beneath the insulation, the victim's mood at the time of the shooting, evidence of a weakness in the victim's right hand, the hand allegedly used to hold the knife, and defendant's unusual and pointed comments to the police constituted sufficient evidence to submit the case to the trier of fact. The evidence showed that defendant was fully aware of the victim's propensities when the fatal meeting was arranged. Mindful of our duty to view the evidence in the light most favorable to the prosecutor and to make every effort to defer to the jury's verdict, *Nowack, supra*, we conclude that the question whether defendant was acting to preserve his life or had lured the victim into a confrontation was properly a matter for the jury to decide. Accordingly, the trial court did not err when it denied defendant's motion for a directed verdict at the conclusion of the prosecution's case in chief because a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

II

Defendant argues next that the trial court's questioning of one of the witnesses, a police detective, pierced the veil of judicial impartiality and denied him a fair trial. We disagree.

MRE 614(b) provides that a trial court may question witnesses. In appropriate instances, a trial court "may have good reason to question a witness in order to enhance the role of the criminal trial as a search for substantive truth." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Two such reasons would be "to clarify testimony or elicit additional relevant information." *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). "The principal limitation on a court's decision over matters of trial conduct is that its actions do not pierce the veil of judicial impartiality." *Davis, supra* at 50. Thus, when questioning a witness, "the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Conyers, supra* at 405. The test is whether the court's questions or comments may have aroused the jury's suspicions about the credibility of a witness or could have influenced the jury against the defendant's case. *Id.* The

court may not take on the role of the prosecutor. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994).

In the instant case, one of the witnesses, Detective Miller, testified that he believed defendant planted the knife allegedly used by the victim to threaten defendant near the victim's body. At the conclusion of defense counsel's cross-examination of this witness, the trial court asked Detective Miller whether the court correctly understood his position to be that the knife was planted. When Detective Miller answered that it was, the court asked the detective on what facts his opinion was based. Detective Miller then testified regarding his reasons for believing that the knife was planted and the court, on one occasion, directed Detective Miller to confine his testimony to his observations.

Having reviewed the record, we find no abuse of discretion by the trial court. The record reveals nothing intimidating or argumentative about the trial court's questions posed to Detective Miller. The court's comments were neutral and the court specifically cautioned the witness to limit his testimony to observations, not hearsay. Simply because the court's questions elicited testimony damaging to defendant's case does not establish that the court improperly assumed the role of the prosecutor; a trial court does not pierce the veil of judicial impartiality simply by asking impartial questions that result in damaging testimony. *Davis, supra* at 51. Here, the court asked the detective to explain what observations supported his testimony that he believed that defendant had planted the knife. This question would have been appropriate for redirect examination because the defense opened the door with its cross-examination of Detective Miller:

As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality, we believe that a trial court is free to ask questions of witnesses that assist in the search for truth. [*Id.* at 52.]

Defendant's argument is therefore without merit.

III

Defendant next argues that the trial court erred by denying his motion to quash the information. Defendant maintains that the prosecutor failed to present sufficient evidence to support a bindover on the charge of voluntary manslaughter, because the evidence demonstrated that the killing was done in self-defense. However, because we have concluded that sufficient evidence was presented at trial to convict defendant, the error, if any, that may have occurred in the bindover is harmless. *People v Cummings*, 229 Mich App 151, 158; 580 NW2d 480 (1998), rev'd on other grounds, 458 Mich 877 (1998); *People v Dunham*, 220 Mich App 268, 276-277; 559 NW2d 360 (1996).

IV

Defendant next contends that the trial court abused its discretion by failing to conduct an adequate voir dire. Defendant argues that the trial court did not sufficiently delve into juror attitudes regarding self-defense, gun ownership, and the right to remain silent. We disagree.

The trial court's decision concerning the scope and conduct of voir dire is reviewed for an abuse of discretion. MCR 6.412(C)(1) & (2); *People v Tyburski*, 445 Mich 606, 619; 518

NW2d 441 (1984) (opinion by Mallett, J.); *People v Daniels*, 192 Mich App 658, 666; 482 NW2d 176 (1992). When the trial court conducts voir dire, “the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised.” *Tyburski, supra* at 619. The trial court is required “to conduct a thorough and conscientious voir dire . . .” *Id.* at 623. A defendant does not have the right to have counsel conduct voir dire or to have the court ask questions submitted by counsel. *Id.* at 619.

Because defendant first raised this issue in his motion for a new trial, the issue whether the trial court’s voir dire was adequate is unpreserved for appellate review.¹ *People v White*, 168 Mich App 596, 604; 425 NW2d 193 (1988). Thus, defendant must demonstrate plain error affecting substantial rights in order to avoid forfeiture of this unpreserved issue. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Here, the trial court was within its discretion to deny defendant’s pretrial motion for attorney voir dire. *Tyburski, supra*. Also, the trial court was not required to ask the question submitted by defendant only minutes before the start of the proceedings. *Id.* Moreover, our review of the record indicates that the manner in which the trial judge conducted the jury voir dire was not an abuse of his discretion. Contrary to defendant’s contention, the court did in fact cover the salient points of self-defense, the no duty to retreat rule, firearm ownership, the burden of proof, and defendant’s right to remain silent. These concepts were sufficiently developed so as to allow the defense to “make an independent determination of a juror’s ability to be impartial.” *Tyburski, supra* at 620.

Defendant complains that the trial court’s questions did not sufficiently probe the issues. However, defendant was not entitled to have the questions framed precisely as he would have liked. Defendant was entitled only to a thorough and conscientious voir dire that would allow him to intelligently exercise his challenges to the prospective jurors. *Id.* This he received, as is evident from the trial court’s questions. Defendant has failed to demonstrate that the trial court abused its discretion and, given the unpreserved status of this issue, has failed to demonstrate plain error affecting substantial rights – defendant cannot establish that the result of the proceeding would have been different had the trial court asked different questions. *Carines, supra; Grant, supra*. Defendant’s argument is therefore without merit.

V

¹ Before trial, defendant filed a motion seeking the right to have defense counsel ask voir dire questions. The trial court denied this motion. After the jury was selected and before the prosecution began its case in chief, the trial court acknowledged (apparently in response to a request made during trial but off the record by defense counsel) that defense counsel’s prior motion to participate in voir dire was denied, and that the trial court’s refusal to permit defense counsel’s participation in voir dire was an issue that should be deemed preserved for appeal. The record does not establish, however, that defendant lodged any objection to the adequacy of the voir dire actually conducted by the trial court.

Defendant next argues the trial court abused its discretion by denying his motion for a new trial on the basis of juror misconduct. Specifically, defendant maintains that he was denied his right to a fair trial when the jury foreperson failed to disclose the true extent of her knowledge of the victim's family. We disagree.

In his motion for a new trial, defendant submitted an affidavit from a woman who claimed to be best friends with Juror #10. In that affidavit, the woman claimed that Juror #10 knew and "occasionally socialized" with the victim's sister, Connie Moon, and that Juror #10 knew that Connie Moon was the victim's sister. The affiant also claimed that Juror #10 talked with Moon during the trial and that one of the reasons the jury convicted defendant was because he failed to testify.

Defendant now contends that this evidence of alleged juror misconduct entitles him to a new trial. Defendant's claims of misconduct are threefold: (1) that Juror #10 failed to disclose the extent of her relationship with the victim's family; (2) that Juror #10 convicted defendant based on his exercise of the right not to testify; and (3) that Juror #10 had a conversation with the victim's sister during the trial.

Where a juror fails to disclose information during voir dire, a defendant is entitled to a new trial only upon a showing that the defendant was actually prejudiced by the juror's presence or that the juror was properly excusable for cause had the information been disclosed. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), quoting *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998). Here, Juror #10 disclosed during voir dire that she knew the victim's sister but that her knowledge of the victim's family was limited. Defendant claims that Juror #10 failed to disclose that she "occasionally socialized" with the victim's sister. Defendant has not stated a basis for relief. As noted by the trial court, the juror's disclosure was not inconsistent with the allegation in the affidavit that she socialized with the victim's sister.

Also, defendant is not entitled to a new trial on the basis of the allegation that Juror #10 voted to convict defendant partly because he decided not to testify. The affidavit submitted by defendant may not be used to impeach the jury's verdict on this matter. "[O]nce a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). Thus, "[t]he general rule is that jurors may not impeach their verdict by oral testimony or by affidavit." *Heintz v Akbar*, 161 Mich App 533, 540; 411 NW2d 736 (1987). This rule applies with equal force where a non-juror challenges the verdict. *Mandjiak v Meijer's Super Markets, Inc.*, 364 Mich 456, 460-461; 110 NW2d 802 (1961); *Shiner v Detroit*, 150 Mich App 420, 424-425; 387 NW2d 872 (1986). Whether the jury convicted defendant based on his exercise of the right to remain silent does not involve an extraneous influence on the jury. Rather, it was intrinsic to the jury's deliberative process. *Budzyn, supra* at 91.

Finally, even assuming that Juror #10 did have a conversation with the victim's sister during trial, defendant is not entitled to a new trial. The trial court noted that, although such communication would constitute misconduct, there was nothing to suggest that it affected the outcome of the trial. We agree. When claiming that a juror was affected by an extraneous influence, a defendant must show that the extraneous influence "is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and

the adverse verdict.” *Budzyn, supra* at 89. See also *People v Fetterly*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998). Absent any showing that the conversation had anything to do with the merits of the case itself, defendant has not met his burden of showing the requisite prejudice. The trial court therefore did not abuse its discretion by denying defendant’s motion for a new trial.

VI

Finally, in defendant’s remaining appellate issues, he in essence claims that the jury’s verdict was against the great weight of the evidence. However, we conclude that the trial court did not abuse its discretion by denying defendant’s motion for a new trial based on this ground. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000); *People v Brown*, 239 Mich App 735, 744-745; 610 NW2d 234 (2000); *Daoust, supra* at 16.

A new trial based on the weight of the evidence should be granted only where the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The trial court may not sit as the thirteenth juror and repudiate the jury’s verdict simply because the court disbelieves the prosecutor’s witnesses. *Lemmon, supra* at 627, 636. Absent exceptional circumstances, the credibility of witnesses is a matter for the jury to decide. *Id.* at 642. When the “testimony is in direct conflict and testimony supporting the verdict has been impeached, if ‘it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,’ the credibility of witnesses is for the jury” to resolve. *Id.* at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).

Defendant argues that the prosecutor’s case rested on Detective Miller’s theory that defendant planted the knife near the victim’s body – a theory allegedly unsupported by the evidence. However, taking note of our conclusion that the prosecutor presented legally sufficient evidence supporting the charged offenses, see text at Issue II, *supra*, we conclude that the jury was justified to examine Detective Miller’s theory against the physical evidence and decide whether it was a valid theory. Moreover, the jury was free to believe or disbelieve the testimony regarding the respective reputations of defendant and the victim. The jury may believe or disbelieve, in whole or in part, any of the evidence presented. *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975). Detective Miller’s testimony was not patently incredible or so inherently implausible that a reasonable juror could not believe it. *Lemmon, supra* at 643. Defendant therefore has not demonstrated that the trial court abused its discretion by denying his motion for a new trial based on the weight of the evidence.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski